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OSHA CRIMINAL PENALTY REFORM ACT

AUGUST 1 (legislative day, JULY 10), 1990.—Ordered to be printed

Mr. KENNEDY, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 2154]

The Committee on Labor and Human Resources, to which was referred the bill (S. 2154) to amend the provisions of the Occupational Safety and Health Act of 1970 relating to criminal penalties, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "OSHA Criminal Penalty Reform Act".

39-010

S543-20

SEC. 2. OSHA CRIMINAL PENALTIES.

(a) IN GENERAL.—Section 17 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 666) is amended—

(1) in subsection (e)—

(A) by striking "fine of not more than $10,000" and inserting "fine in accordance with section 3571 of title 18, United States Code,";

(B) by striking "six months" and inserting "10 years";

(C) by striking "fine of not more than $20,000" and inserting "fine in accordance with section 3571 of title 18, United States Code,"; and

(D) by striking "one year" and inserting "20 years";

(2) in subsection (f), by striking "fine of not more than $1,000 or by imprisonment for not more than six months," and inserting "fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 2 years,";

(3) in subsection (g), by striking "fine of not more than $10,000, or by imprisonment for not more than six months," and inserting "fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 1 year,";

(4) by redesignating subsections (h) through (l) as subsections (i) through (m), respectively;

(5) by inserting after subsection (g) the following new subsection:

"(h) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6, or any regulation prescribed pursuant to this Act, and that violation causes serious bodily injury to any employee but does not cause death to any employee, shall, upon conviction, be punished by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 5 years, or by both, except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 10 years, or by both."; and

(6) by adding at the end the following new subsection:

"(n) If a penalty or fine is imposed on a director, officer, or agent of an employer under subsection (e), (f), (g), or (h), such penalty or fine shall not be paid out of the assets of the employer on behalf of that individual.".

(b) DEFINITION.—Section 3 of such Act (29 U.S.C. 652) is amended by adding at the end the following new paragraph:

"(15) The term 'serious bodily injury' means bodily injury that involves—

"(A) a substantial risk of death;

"(B) protracted unconsciousness;

"(C) protracted and obvious physical disfigurement; or

"(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.".

(c) JURISDICTION FOR PROSECUTION UNDER STATE AND LOCAL CRIMINAL LAWS.—Section 17 of such Act (29 U.S.C. 666) (as amended by subsection (a) of this section) is further amended by adding at the end the following new subsection:

"(o) Nothing in this Act shall preclude State and local law enforcement agencies from conducting criminal prosecutions in accordance with the laws of such State or locality.".

I. SUMMARY OF THE BILL

S. 2154, the OSHA Criminal Penalty Reform Act, modifies the criminal penalty provisions of the Occupational Safety and Health (OSH) Act to create an effective deterrent to potential willful violators of federal occupational safety and health standards. The current criminal penalties under the OSH Act are wholly inadequate to provide such a deterrent.

Under current law, if an employer willfully violates a health or safety standard under the OSH Act and that violation causes the death of any employee, the maximum penalty is no more than six months in prison—a simple misdemeanor. There is no criminal penalty whatsoever for a willful violation that maims, cripples or seriously injures a worker.

Given this inadequate penalty structure, scarce investigative and prosecutorial resources simply have not been devoted to enforcing the criminal provisions of the OSH Act. Since the enactment of the OSH Act some twenty years ago, there have been only a handful of criminal prosecutions. In 1989, for the first time in the history of the OSH Act, a convicted employer actually served prison time—45 days—for a criminal violation of the OSH Act.

S. 2154 provides a basis for improved criminal enforcement under the OSH Act. In particular, the legislation increases the maximum incarceration penalties for the current criminal offenses under the OSH Act as follows: (1) for a willful violation of an OSH Act health or safety standard that causes the death of a worker, from six months to 10 years for a first conviction and from one year to 20 years for a second conviction; (2) for providing advance notice of any inspection under the OSH Act, from six months to 2 years; and (3) for knowingly making a false statement in any document required under the OSH Act, from six months to one year. In addition, S. 2154 creates a new criminal sanction for willful violation of the OSH Act that causes serious bodily injury to an employee with a maximum prison term of 5 years for a first conviction, 10 years for a second conviction. The legislation includes a definition of "serious bodily injury" that is consistent with current statutory definitions and court interpretations of that term.

The bill also makes clear that for any criminal offense under the OSH Act, a fine in accordance with section 3571 of title 18 of the United States Code may be imposed in lieu of or in addition to a term of imprisonment. With regard to any fines imposed upon individual directors, officers or agents of an employer for criminal violations of the OSH Act, the bill provides that such individuals shall not be allowed to rely on the assets of the employer to pay the fines. Thus individuals who are responsible for willful disregard of workplace safety and health standards will be prevented from passing on the costs of their criminal acts to the corporate entity.

Finally, the bill expressly preserves the right of state and local law enforcement authorities to bring criminal prosecutions under state or local law. The criminal sanctions in the OSH Act should not displace general criminal sanctions in state or local law, including such crimes as murder, reckless homicide, or assault.

The OSHA Criminal Penalty Reform Act strengthens the outdated and inadequate criminal penalty provisions of the OSH Act. An effective criminal penalty system will complement and enhance federal civil enforcement efforts to protect the safety and health of workers.

II. Background and Need for Legislation

A. Introduction

The stated purpose of the Occupational Safety and Health (OSH) Act of 1970 is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. 651(b). To meet that ambitious purpose, Congress stated that there must be "an effective enforcement program" which would include both civil and criminal sanctions. See 29 U.S.C. 651(b)(10); 666. Unfortunately, the existing

criminal enforcement program in the OSH Act has been ineffective and indeed virtually nonexistent. The Department of Labor's own Acting Inspector General testified that there was "an appalling lack of criminal enforcement by the Occupational Safety and Health Administration." Hearing on Serious Management Problems in the United States Government before the Senate Committee on Governmental Affairs, 101st Cong., 1st Sess. 81 (1989) (Statement of Raymond Maria, Acting Inspector General, Department of Labor) [hereinafter cited as "IG Hearing"].

S. 2154, the OSHA Criminal Penalty Reform Act (the "Act"), is intended to make criminal enforcement an effective component of the overall health and safety enforcement effort by the Occupational Safety and Health Administration (OSHA). The Act will restore criminal enforcement as a meaningful tool for federal regulators by increasing the current maximum criminal penalties, creating a new substantive offense for willful violations that seriously injure workers, ensuring that individual criminals are held personally responsible, and preserving the authority of state and local authorities to prosecute crimes that occur in the workplace under state or local laws. The OSHA Criminal Penalty Reform Act is necessary to eliminate a glaring deficiency in the OSHA enforcement system.

B. CRIMINAL PENALTIES AND CIVIL ENFORCEMENT

The purpose of the OSH Act is to protect the health and safety of workers, not to maximize the amount of criminal fines collected or to impose stiff prison terms on employers who violate federal standards. However, meaningful criminal sanctions will improve worker health and safety by deterring potential violators. The Department of Justice has acknowledged the need for effective criminal penalties under the OSH Act.

> The Departments of Justice and Labor agree that criminal sanctions for violations of the Occupational Safety and Health Act should be adequate to insure effective enforcement. While the civil provisions are the primary method of enforcing the Occupational Safety and Health Act, criminal sanctions in appropriate cases are an important component of the enforcement scheme.

Letter from Carol Crawford, Assistant Attorney General for Legislative and Intergovernmental Affairs, Department of Justice, to the Honorable Tom Lantos, Chairman, Subcommittee on Employment and Housing of the House Committee on Government Operations 2 (January 16, 1990) [hereinafter cited as "Justice Dept. Letter"].

The Department of Labor's Acting Inspector General was more emphatic on the need for criminal sanctions under the OSH Act: "[i]t is essential, from the perspective of the Office of Inspector General, that criminal investigations and criminal remedies be factored into the OSHA equation to deter needless injuries and deaths." IG Hearing at 82. The Acting Inspector General also explained the importance of criminal penalties as part of a general compliance program within the Department of Labor:

> Achieving a credible deterrent, practically speaking, is the only way to achieve broad-based compliance with the

> law. An inordinate reliance on civil and administrative remedies does not promote deterrence. That approach fosters nothing more than an environment in which the transgression is worth committing because the benefits are so high, the risk and costs of being caught are so low. Those within the environment created historically by the Department of Labor, need pause and ask only one question, "Can I afford the fine?"
>
> There is a visible odium that accrues to being indicted, convicted and jailed. I submit that it is the specter of precisely this kind of disgrace which will add to the credible deterrent at the Department of Labor.

IG Hearing at 84.

Effective criminal sanctions that create a credible deterrent will enhance both OSHA's general mission to achieve broad-based compliance with the law and its specialized mission to obtain prompt abatement of workplace hazards that threaten the health and safety of workers. Evidence from areas where local criminal prosecutors have taken aggressive action against OSH Act violators bears out this conclusion. In 1987, there were at least 15 construction trench fatalities in Texas. In late 1987, the Travis County (Austin) District Attorney began a well-publicized criminal prosecution program against employers who willfully violated construction safety standards. In 1988, there were only two construction trench fatalities in Texas. See Statement of Joseph A. Kinney, Executive Director, National Safe Workplace Institute, Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources 5–6 (May 1, 1990). Likewise, an aggressive criminal prosecution effort in Los Angeles, California, has improved health and safety compliance. The Los Angeles County District Attorney has noted:

> It is our belief, confirmed by the comments of numerous safety engineers and industrial hygienists throughout the County of Los Angeles, that the Los Angeles District Attorney's Occupational Safety and Health enforcement program has made a substantial difference in convincing corporate managers and supervisors that safety in the workplace should be given high priority. * * * The number of prosecutions may be small, but, like a barking dog, their very presence may deter thousands of violations.

Reiner and Chatten-Brown, "When It Is Not an Accident, But a Crime: Prosecutors Get Tough with OSHA Violations," 17 N. Kentucky L. Rev. 83, 103 (1989).

Federal environmental enforcement also demonstrates that criminal sanctions complement civil enforcement programs. In the early 1980s, a separate environmental crimes section was created within the Department of Justice. Since that time, as will be discussed in more detail below, there has been a marked increase in the number of criminal prosecutions under the federal environmental laws. The increased emphasis on criminal enforcement within the environmental program has not hindered the Environmental Protection Agency's civil enforcement and abatement efforts. On

the contrary, there is evidence that the use of criminal sanctions in appropriate cases has fostered greater cooperation from employers in abating environmental hazards so as to avoid potential criminal charges. See e.g., Verespej, "The Newest Environmental Risk: Jail," Industry Week 47 (January 22, 1990); Chowdhury, "Jail: The Rising Peril for Environmental Crime," 95 Chemical Engineering 26 (October 24, 1988). In sum, a meaningful criminal enforcement system is an important component in any effective compliance program, including efforts to enforce federal job safety standards.

C. OSHA CRIMINAL ENFORCEMENT

Unfortunately, OSHA's criminal enforcement record has been abysmal. As documented in a report issued by the House Committee on Government Operations, during the first 18 years under the OSH Act, OSHA referred only 42 cases to the Department of Justice for criminal prosecution. The Department of Justice in turn prosecuted only 14 cases, resulting in 10 convictions. "Getting Away With Murder in the Workplace; OSHA's Nonuse of Criminal Penalties for Safety Violations," 66th Report by the House Committee on Government Operations, 100th Cong, 2nd Sess. 4 (1988) [hereinafter cited as "House Report"]. During that period, between 125,000 and 200,000 workers were killed on the job and tens of millions of workers were injured in workplace accidents. But not one employer spent one night in jail for a criminal offense under the OSH Act.

The current Department of Labor has marginally increased criminal enforcement. In 1989, an employer actually served time in prison for a willful violation of an OSHA construction trench safety standard that caused the death of two workers. The punishment, however, was a mere 45-day sentence. In April 1990, an OSHA criminal case involving another trench cave-in fatality ended in a plea bargain. The employer, a willful and repeated violator, paid a criminal fine of $7,500 and received a four-month suspended sentence after an unsupported trench collapsed and killed a utility worker. The Department of Labor issued a press release expressing "satisfaction" with this result. Most recently, on June 26, 1990, a federal grand jury indicted a construction company for a methane gas explosion in a metropolitan sewer tunnel project that killed three workers. The Department of Labor had referred this case to the Justice Department for criminal prosecution on August 1, 1989.

But this increased activity still cannot be considered a serious effort at criminal enforcement. The Department of Labor's Inspector General recently reviewed criminal enforcement efforts throughout the Department. See Department of Labor Office of Inspector General, "Criminal Enforcement in DOL," Final Report No. 09-90-202-01-001 (June 4, 1990) [hereinafter cited as "IG Report"]. In fiscal year 1989, OSHA pursued 27 criminal investigations and referred 15 to the Justice Department for prosecution. IG Report at 17. In that same year, the Mine Safety and Health Administration (MSHA) pursued 460 criminal investigations, with 25 of the 100 cases reviewed by the Inspector General referred to the Department of Justice for prosecution. Id. The disparity between

OSHA and MSHA criminal enforcement is particularly striking considering that the OSH Act applies to nearly 90 million workers, whereas MSHA jurisdiction is limited to 354,000 miners. Moreover, OSHA and MSHA share a similar philosophy, which is to rely primarily on civil enforcement to ensure prompt abatement of workplace hazards. Yet the reliance on civil enforcement has not negated MSHA's willingness to pursue criminal enforcement in appropriate cases.

The Inspector General predicts that the disparity between OSHA and MSHA criminal enforcement will widen. Relying on a mathematical model, the Inspector General estimated anticipated results for criminal investigations still pending at the end of fiscal year 1989. Based on this statistical model, the Inspector General predicts that OSHA will refer only 17 pending cases to the Department of Justice for criminal prosecution, whereas MSHA should refer 48 cases for prosecution. IG Report at Appendix C-4, C-5. As these modest numbers indicate, MSHA is not overly aggressive in its criminal enforcement efforts: only one percent of its enforcement program involves criminal enforcement. IG Report at Appendix A-4/2. But the fact that MSHA will refer nearly three times as many cases for criminal prosecution as OSHA is a graphic illustration that there is no meaningful enforcement of the criminal provisions of the OSH Act.

The current OSHA criminal enforcement program also stands in sharp contrast to the parallel program for environmental enforcement administered by the Environmental Protection Agency (EPA). In conjunction with the Department of Justice, EPA has stepped up criminal enforcement of the environmental laws during the 1980s. For example, in 1982, an Environmental Crimes Unit was created within the Lands and Natural Resources Division of the Department of Justice. In 1987, that unit was elevated to the status of a section at the Department of Justice. In addition to these prosecutorial resources, by 1988, EPA had 45 special agents (all experienced criminal investigators with full authorization as federal law enforcement officers) and 26 FBI agents dedicated to investigating criminal environmental violations. See EPA Office of Enforcement and Compliance Monitoring, "Overview of EPA Federal Penalty Practices: FY 88" at Appendix A-2 (May 1989).

As a result of this commitment to criminal environmental enforcement, the Justice Department reports that since 1982, it has obtained 432 convictions and guilty pleas from 569 indictments. Over $25 million in criminal fines have been levied and 270 years of jail time imposed, with nearly 40 percent of that time actually served. See also Verespej, "The Newest Environmental Risk: Jail," Industry Week 48 (January 22, 1990); Seymour, "Civil and Criminal Liability of Corporate Officers Under Federal Environmental Laws," BNA Environment Reporter 337 (June 9, 1989). In fiscal year 1989 alone, 69 defendants were convicted of environmental crimes, with over $12 million in criminal fines assessed and some 27 years of incarceration imposed. EPA Office of Enforcement, "Overview of EPA Federal Penalty Practices: FY 89" at Table 3 (April 1990).

There are a number of possible explanations for the sharp disparity between occupational criminal enforcement and environ-

mental criminal enforcement. In 1988, the House Committee concluded that "much of the failure by the Federal Government to seek criminal sanctions for violating Federal OSH laws stems from reluctance by OSHA to proceed." House Report at 4-5. While the charge of "institutional reluctance" may have been a primary reason for the dearth of criminal prosecutions during the previous Administration, the current Department of Labor has been more willing to refer cases to the Department of Justice for criminal prosecution. Yet criminal referrals still are very rare under the OSH Act.

Another explanation is a simple lack of resources. There is no special unit within the Justice Department dedicated to the investigation and prosecution of occupational crimes. OSHA does not have a cadre of special investigators and a complement of FBI agents to focus attention on criminal enforcement. But a lack of resources does not excuse the poor record of criminal enforcement under the OSH Act. First, criminal sanctions are a very effective way to improve compliance at relatively little cost. A targeted criminal enforcement system, like a "barking dog," will deter numerous potential violators and should improve voluntary compliance. In other words, criminal enforcement will produce "more bang for the buck." That is all the more reason, given limited resources, to wage an aggressive criminal enforcement program.

Moreover, the disparity between enforcement resources at EPA and OSHA may be a symptom of the root cause of the problem. A key reason for the surge in environmental criminal prosecutions in the 1980s is that Congress enacted environmental statutes with tough criminal sanctions. For example, in 1980, Congress enacted amendments to the Resource Conservation and Recovery act (RCRA) to establish the first felony sanctions for a federal environmental statute. 42 U.S.C. 6928(e). The initial maximum penalty for "knowing endangerment," a crime in which the violator disposes of hazardous waste knowing that such action places another person in "imminent danger of death or serious bodily injury," was 5 years in prison. In 1984, Congress increased the penalty to 15 years in prison. Likewise in 1987, Congress enacted the same tough "knowing endangerment" provision in the Clean Water Act. 33 U.S.C. 1319.

Under these statutes, it is a crime even if no death or serious bodily injury occurs—the "imminent danger" of such events taking place is sufficient. By enacting tough criminal penalties, Congress signaled to the regulatory agency and to the prosecutors that there was a strong policy in favor of criminal enforcement. It is therefore not surprising that EPA and the Department of Justice subsequently devoted significant resources to criminal enforcement of the federal environmental laws.

The current criminal sanctions under the OSH Act send the opposite message. The maximum penalty for a willful violation of the OSH Act that causes death to any worker is six months incarceration, a simple misdemeanor. 29 U.S.C. 666(e). The de minimis nature of that penalty should be put into perspective. The maximum penalty for "maliciously caus[ing] the death or harassment of any wild free-roaming horse or burro" is one year in prison, twice as long as the penalty for killing a worker. 16 U.S.C. 1338(a).

Without a realistic threat of imprisonment, it is too easy for employers to consider the current OSH Act criminal penalty as just another cost of doing business. For example, the Committee heard testimony from two surviving family members of workers killed at the workplace. Ms. Charlene Gadsden of Bridgeport, Connecticut, testified about the death of her father, Charles Jeffers, who fell to his death while removing a deck from the top of a bridge. He had been assigned to work 70 feet above the water with no life vest, no safety line, and no netting beneath him. The employer, who previously had been cited for similar violations, was cited for a willful violation of the OSH Act for failing to provide safety equipment. But the only penalty assessed was a civil fine of some $20,000.

The Committee also heard from Ms. Roxanne DeLuise, the widow of David DeLuise, a steelworker who was burned to death when a boiler he was cleaning exploded. The state inspectors concluded that the welding in the boiler was substandard and the inspection reports were deficient. Despite this finding and the fact that there were 16 fatalities at this particular steel mill in the 1980s, the employer was fined only $1,000.

The lack of meaningful punishment under the OSH Act also sends a direct message for the prosecutors: do not bother to prosecute these cases. Department of Labor officials have acknowledged this problem:

> My perception is that very often the attitude in the U.S. attorneys' offices is that misdemeanors are just not as important as felonies. They don't count as much on their ledger in terms of, "What did we accomplish this year?"

"Criminal Prosecution: A BNA Interview with Cynthia L. Attwood and Daniel J. Mick, Labor Department Solicitor's Office," BNA Occupational Safety and Health Reporter 1054 (March 4, 1987) (response of Cynthia L. Attwood).

This perception is borne out by the general guidelines for prosecutorial discretion employed by the Justice Department:

> Since federal judicial resources are not sufficient to permit prosecution of every potential federal offense, an exercise of prosecutorial discretion is required in each case.
>
> * * * * *
>
> As a general matter, the deterrent value of prosecution is often a strong factor in favor of prosecution. . . . Another frequent countervailing factor is whether a sentence sufficient to the seriousness of the offense and to the necessary investment of prosecutorial resources could be obtained in the event of a conviction.

Letter from Thomas M. Boyd, Assistant Attorney General for Legislative and Intergovernmental Affairs, Department of Justice, to the Honorable Tom Lantos, Chairman, Subcommittee on Employment and Housing of the House Committee on Government Operations 3-4 (December 9, 1988) [hereinafter cited as "Boyd Letter"].

The Department of Justice has recognized the need to change the current penalty for a willful violation that causes death to a

worker. The Department of Justice "agrees that [current] penalties are insufficient for willful conduct which leads to loss of human life and supports an increase in such penalties." Justice Dept. Letter at 2. See also Boyd Letter at 2 ("The Department of Justice . . . would be happy to see an increase in the period of imprisonment authorized for a criminal violation of OSHA safety standards."). The Department of Labor expressly endorsed the stiffer penalties:

> [W]e do support the change in characterization from misdemeanor to felony in cases where willful violations lead to death. We feel the reclassification would be likely to enhance the priorities accorded OSHA cases for prosecution by U.S. Attorneys, who ultimately must decide whether such cases are suitable for prosecution.

Statement of Gerard F. Scannell, Assistant Secretary of Labor, Occupational Safety and Health Administration, United States Department of Labor, Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources 12 (May 1, 1990) [hereinafter cited as "Scannell Statement"].

But the inadequacy of the current penalty for a willful violation that leads to death is only one problem with OSHA's criminal enforcement system. Perhaps even more troubling is the absence of any criminal sanction whatsoever for a willful violation that causes serious bodily injury, but does not cause death. The lack of such a penalty completely undermines the deterrent effect of the OSHA criminal enforcement system. For example, if an employer willfully violates the OSH Act, thereby killing a worker, criminal sanctions under the OSH Act apply. If that same employer engages in the same willful violation, and the worker suffers permanent brain damage or paralysis, but is not killed, then there is no criminal penalty whatsoever under the OSH Act. The availability of a criminal sanction should not turn on factors that may be completely outside the control of the perpetrator and in some cases may be a matter of sheer luck.

The consequences of such a system can be appalling in human terms. In one incident brought to the attention of the Committee, a worker had both her hands chopped off by a stamping machine. The employer previously had been cited repeatedly for failing to provide safety devices on the machine. Despite a willful and repeated violation of the OSH Act that caused a devastating injury, the employer was not subject to any criminal penalty under the OSH Act and subsequently paid a mere $100 civil fine.

In another example, OSHA recently intervened at a secondary lead smelting plant to protect workers from lead poisoning. OSHA posted "imminent danger" notices to alert workers that "a danger exists which could reasonably be expected to cause death or serious physical harm immediately." OSHA also obtained a court order to remove workers with excessive blood lead levels from the plant. Medical examination revealed that workers were suffering from neurological, reproductive system, and kidney damage, which could well be irreversible. OSHA cited the employer for numerous willful violations including a consistent failure to abate hazards identified in previous citations. Despite this egregious conduct, the employer

cannot be prosecuted under the current criminal provisions of the OSH Act.

The Department of Justice and responsible members of the business community recognize the inequity in the current system. The Department of Justice "agrees that expanding criminal penalties to willful violations which result in serious injuries to employees merits serious consideration". Justice Dept. Letter at 4. See also Boyd Letter at 2 ("We would also be inclined to give serious consideration to proposals to expand the application of criminal sanctions to include violations which lead to serious injuries, in addition to those which lead to the death of an employee.") In addition, the National Association of Manufacturers, whose 13,500 member companies employ 85 percent of all workers in manufacturing, testified that it "does not oppose expanding OSHA criminal penalties to willful violations that result in serious injuries to employees." Statement of the National Association of Manufacturers, Submitted for the Hearing Record on S. 2154—OSHA Criminal Penalty Reform Act to the Subcommittee on Labor of the Senate Committee on Labor and Human Resources 3 (May 1, 1990). The Synthetic Organic Chemical Manufacturers Association (SOCMA), which represents more than 200 small organic chemical companies, also expressed support in testimony submitted to the Labor Subcommittee: "SOCMA generally supports the concept of increased criminal penalties when an employer knowingly violates the Occupational Safety and Health Act and this violation leads to serious injury, illness or to the death of an employee." Statement of SOCMA, Submitted for the Hearing Record on S. 2154—OSHA Criminal Penalty Reform Act to the Subcommittee on Labor of the Senate Committee on Labor and Human Resources 1 (May 1, 1990).

Adding a criminal sanction for serious bodily injury will close a glaring loophole in the current law. It will lead to a more equitable and more predictable system of sanctions, which in turn, will improve the deterrent impact of OHSA's criminal enforcement effort. The creation of a new criminal offense for serious bodily injury should enhance OSHA's ability to assure safe and healthful working conditions for all workers.

Incarceration is an effective deterrent, in part, because it focuses the punishment on the responsible individual. Imprisonment cannot be passed on to others and cannot be considered as a simple cost of doing business. It follows that the deterrent value of criminal fines may be enhanced to the extent that responsible individuals are forced to pay the fines themselves, rather than passing them on to the corporate entity. Thus, while it is important to have criminal fines large enough to have an impact on corporate behavior, it is equally important to hold individuals convicted of crimes under the OSH Act personally accountable for payment of any criminal fines imposed. That will enhance the deterrent impact of such fines, and will send a message to corporate executives that willful disregard for worker safety and health will not be tolerated.

D. OSH ACT PREEMPTION

Although OSHA has not maintained an aggressive criminal enforcement program, state and local prosecutors throughout the

nation have become more active in pursuing criminal convictions for crimes that occur in the workplace. In the last five years, state and local prosecutors have brought dozens of criminal cases for workplace injuries and deaths in California, Colorado, Illinois, Maine, Maryland, Michigan, New York, Texas and Wisconsin. See e.g., National Safe Workplace Institute, Criminal Job Safety Prosecutions: Lessons Learned, Prospects for the Future 14-21 (July 1990). Defendants, however, have challenged a number of state court convictions on the ground that the OSH Act preempts state prosecution for workplace injuries or fatalities. The basis for this argument is section 18 of the OSH Act which provides in relevant part:

> (a) Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6.
>
> (b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety or health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. 667

Courts have held that section 18 of the OSH Act "expressly preempts state law pertaining to issues that are addressed by OSHA standards unless a state plan has been approved by the Secretary." *New Jersey State Chamber of Commerce* v. *Hughey*, 774 F. 2d 587, 592 (3d. Cir. 1985). See also *Environmental Encapsulating Corp.* v. *City of New York*, 855 F. 2d 48, 57 (2d Cir. 1988) (Section 18 "expressly preempts only those portions of the [state] program which do not have a legitimate and substantial purpose apart from the promotion of occupational health and safety.") Obviously, where a state plan has been approved and state law governs safety and health in the workplace, there can be no issue of preemption. Preemption of state criminal prosecutions, therefore, becomes an issue only in those states where there is not an approved state OSHA plan. Twenty-seven states do not have such a plan. State courts that have addressed the issue have split. Compare *People* v. *Hegedus*, 443 N.W. 2d 127 (Mich. 1989) (no preemption); *Illinois* v. *Chicago Magnet Wire Corp.*, 534 N.E. 2d 962 (Ill.), cert. denied sub nom. *Asta* v. *Illinois*, 110 S. Ct. 52 (1989) (no preemption); and *Wisconsin ex rel. Cornellier* v. *Black*, 425 N.W. 21 (Wis. Ct. App.), review denied, 430 N.W. 2d 351 (Wis. 1988) (no preemption); with *Sabine Consolidated Inc.* v. *Texas*, 756 S.W. 2d 865 (Tex. Ct. App. 1988) (preemption); and *Colorado* v. *Kelran Construction Inc.*, 13 OSHC 1898 (Colo. D. Ct. 1988) (preemption).

The preemption argument is grounded on the assumption that section 18 of the OSH Act demonstrates Congress' intent to preempt all state laws that in any way could relate to workplace safety or health, including criminal laws of general application. That assumption is unfounded. The Department of Justice, in 1988,

correctly concluded that the OSH Act does not warrant such an overly broad interpretation:

> As for the narrower issues as to whether the criminal penalty provisions of the OSH Act were intended to preempt criminal law enforcement in the workplace and preclude the States from enforcing against employers the criminal laws of general application, such as murder, manslaughter, and assault, it is our view that no such preemption was intended by Congress. As a general matter, we see nothing in the OSH Act or its legislative history which indicates that Congress intended for the relatively limited criminal penalties provided by the Act to deprive employees of the protection provided by State laws of general applicability.

Boyd Letter at 2–3.

The Department of Labor expressly endorsed the need to protect the efforts of state and local prosecutors:

> [W]e are in general agreement with the support [S. 2154] would offer to State and local prosecutors in their efforts to enforce State criminal statutes in the context of workplace injury or deaths. We agree that States should not be pre-empted from enforcing criminal laws of general applicability, such as those dealing with murder, manslaughter, or assault.

Scannell Statement at 12–13

The continued threat of state or local prosecution provides an additional and important means of deterring potential violators of workplace safety and health standards. Because there has been some uncertainty in the courts on this question, there is a need for Congress to reaffirm expressly that the OSH Act does not preempt state or local criminal prosecutions for workplace injuries or fatalities.

III. History of the Legislation

On February 21, 1990, Senator Metzenbaum introduced S. 2154, a bill to amend the provisions of the Occupational Safety and Health Act of 1970 relating to criminal penalties, and for other purposes. Senators Mikulski, Simon, Adams, and Kennedy were original cosponsors of S. 2154. The bill was referred to the Committee on Labor and Human Resources. A hearing on S. 2154 was held on May 1, 1990, before the Subcommittee on Labor. The legislation was considered at an executive session of the Committee on Labor and Human Resources on June 27, 1990. Senators Metzenbaum and Jeffords proposed an amendment in the nature of a substitute. The substitute amendment was accepted by the Committee on Labor and Human Resources on June 27, 1990.

IV. Hearings

A public hearing was conducted by the Subcommittee on Labor in Washington, D.C., on May 1, 1990, to review the penalties and procedures under the Occupational Safety and Health Act of 1970,

including a review of S. 2154, a bill to amend the provisions of the Occupational Safety and Health Act of 1970 relating to criminal penalties, and for other purposes. The following individuals presented testimony:

The Honorable Frank R. Lautenberg, United States Senator from New Jersey;

The Honorable Tom Lantos, United States Representative from California;

Charlene Gasden, Bridgeport, Connecticut;

Roxanne L. DeLuise, Allentown, Pennsylvania;

Joseph A. Kinney, Executive Director, National Safe Workplace Institute, Chicago, Illinois;

Gerald F. Scannell, Assistant Secretary for Occupational Safety and Health, United States Department of Labor, Washington, D.C.;

Robert P. Davis, Solicitor, United States Department of Labor, Washington, D.C.;

Margaret Seminario, Director of the Department of Occupational Safety and Health, AFL–CIO, Washington, D.C.;

George C. Freeman, Jr., Partner, Hunton & Williams, Richmond, Virginia, on behalf of the United States Chamber of Commerce;

Kirk Fordice, President, Associated General Contractors of America, Washington, D.C.; and

Jan Chatten-Brown, Special Assistant to the District Attorney, Los Angeles, California.

V. Committee Views

A. General Principles

S. 2154, the OSHA Criminal Penalty Reform Act (the "Act"), reflects Congress's intent to strengthen criminal enforcement under the Occupational Safety and Health ("OSH") Act. Criminal sanctions should become a meaningful part of the overall federal effort to protect worker safety and health. Since its enactment in 1970, the OSH Act has provided for criminal penalties for violations of workplace safety and health standards. But those sanctions are ineffective, as demonstrated by the virtual lack of any criminal enforcement by the Occupational Safety and Health Administration (OSHA) over the past 20 years. The recent report by the Department of Labor's Inspector General documents that OSHA criminal enforcement accounts for only one-half of one percent of OSHA's overall enforcement effort. IG Report at Appendix A–3/2.

This legislation is focused narrowly to increase the role of criminal enforcement of the OSH Act. The Committee intends to remove any statutory barriers to waging an aggressive criminal enforcement campaign. At the same time, the Committee seeks to send a dual message. To employers, the message is that willful violations of OSHA standards that kill or seriously injure workers are crimes, not just mistakes that can be written off as a cost of doing business. If an employer wants to avoid prison or a substantial criminal fine, then it should take steps to avoid such willful violations. To prosecutors and to regulators, the message is that Congress is serious about protecting worker safety and health, and resources

should be devoted to that effort by investigating and prosecuting OSH Act criminals. By increasing the criminal penalties, the Act removes any prior basis for not allocating prosecutorial and investigative resources to OSH Act crimes because the likelihood of significant penalty was so low.

The Act involves reform of criminal penalties; it does not reform the criminal law. Therefore, the accepted principles of criminal law that apply to all other federal criminal statutes apply to crimes under the OSH Act, as well. One such general principle is that the federal prosecutor bears the burden of proof, beyond a reasonable doubt, that each element of the crime was committed. That principle applies to criminal sanctions under the OSH Act—this Act has no effect on that principle.

For example, there are four elements to the current OSH Act crime for a willful violation of an OSHA standard that causes death to a worker: (1) an OSHA standard; (2) a willful violation of that standard; (3) the death of worker; and (4) a causal link between the violation and the death. Under current law, which is unchanged by this Act, the prosecutor must prove the existence of each of those four elements beyond a reasonable doubt. Likewise, under current law, the defendant will have a full and fair opportunity to present a defense. That defense may include presentation of relevant evidence so as to raise a reasonable doubt about the existence of any one or all of the elements of the crime. For example, relevant evidence about the drug or alcohol use of the victim may raise a reasonable doubt about the causal link between a willful OSH Act violation and the subsequent death. To the extent that a defendant could offer such evidence under current law, this Act will not change the law in that regard. Moreover, the Committee does not intend to curtail or augment a criminal defendant's existing statutory or constitutional rights. Thus, this Act will not affect the general operation of the criminal law. Instead, it merely adjusts penalties within the general criminal law context.

In addition, this Act says nothing about which particular cases should be prosecuted. The Committee recognizes that judicial, prosecutorial and investigative resources are insufficent to permit prosecution of every potential criminal offense. The prosecutor must exercise discretion in determining, on a case-by-case basis, whether to prosecute a potential criminal offense. The Department of Justice currently considers a number of factors in deciding whether to go forward with a case:

> Among the factors considered in evaluating a case for potential prosecution are the threshold issues of whether there is probable cause to believe the potential defendant's conduct constitutes a federal offense and whether the admissible evidence is likely to be sufficient to obtain and sustain a conviction. Other potentially pertinent factors include federal law enforcement priorities, the nature and seriousness of the offense, the deterrent effect of prosecution, the potential defendant's culpability in connection with the offense, the potential defendant's history of criminal activity, the person's willingness to cooperate in the investigation or prosecution of others, and the probable sen-

> tence or other consequences if the person is convicted. Also potentially pertinent are whether the person is subject to effective prosecution in another jurisdiction and whether there is an adequate non-criminal alternative to prosecution. The United States Attorneys must also consider the immediate practical problems of allocating prosecutorial resources within their districts, as well as local federal law enforcement priorities.

Boyd Letter at 3.

The Committee does not intend to limit such prosecutorial discretion. Moreover, under the OSH Act, there is a second level of discretion because the Department of Justice criminally prosecutes only those cases that are referred by the Department of Labor. Thus, the Department of Labor exercises discretion initially in determining whether to refer a case to the Justice Department. The Act will not eliminate this double layer of discretion. Although the Committee, of course, will not dictate prosecutorial decisions in individual cases, the Committee does expect both OSHA and the Department of Justice to use the new penalties embodied in the Act to increase general criminal enforcement of the OSH Act.

The Committee also does not intend to change the current interpretation of existing terms under the OSH Act. For example, one key element of the OSH Act crime involving the death of a worker is that the employer "willfully violates" an OSHA health or safety standard. There is no definition of "willfully" in the OSH Act, nor is there one in this Act. But that term has been interpreted by the courts under the OSH Act and under the general principles of criminal law. Rather than create a new term or definition which might cause confusion and uncertainty, the Committee adopts the existing meaning of the term "willfully" as interpreted by the courts. See e.g. *Brock* v. *Morello Brothers Construction, Inc.*, 809 F. 2d 161, 164 (1st Cir. 1987) ("In the criminal law, 'willful' conduct typically means that the offender not only intended to perform the unlawful act, but also that he knew that what he did was unlawful.") Given that the term "willfully" has been in the OSH Act since its inception, the Committee expects that employers will be familiar with the types of conduct that would be considered willful violations and that, depending upon the circumstance, may result in criminal prosecution. Employers should be able to plan their activities accordingly to avoid such violations and potential prosecutions.

B. INCREASING INCARCERATION PENALTIES

The Act increases the current maximum incarceration penalties for existing crimes under the OSH Act to reflect the serious nature of these crimes. As discussed in detail in section II of this report, the current criminal sanctions are insufficient to punish flagrant OSHA violators and as such have little or no deterrent effect on potential violators.

To remedy this problem, the Act increases the existing maximum incarceration terms as follows: (1) for a willful violation that causes death, from six months to 10 years, for a first conviction; and from one year to 20 years for a second conviction; (2) for giving advance

notice of any OSHA inspection from six months to two years; and (3) for knowingly making a false statement or representation in any document required to be filed or maintained by the OSH Act, from six months to one year. These penalties reflect a strong congressional policy that workplace crimes must have sufficient penalties. The particular terms of years are consistent with similar penalties within the federal criminal code. For example, the crime of "knowing endangerment" under the Resource Recovery and Conservation Act (RCRA) involves a knowing violation of the environmental standards for handling hazardous substances that place a person in imminent danger of death or serious bodily injury. 42 U.S.C. 6928(e). The penalty under RCRA for "knowing endangerment" is a maximum 15 years in prison. As a matter of equity, then, a willful violation of a workplace standard that causes the death (not just imminent danger of death) of a worker should have a maximum penalty in the same range as the RCRA crime. The maximum term in the Act, 10 years for a first conviction, 20 years for a second conviction, is consistent with the existing 15 year term for the environmental crime.

The incarceration penalties, however, are maximum terms. The Committee understands that actual sentences imposed may well be less than the maximum allowed in the Act. Moreover, the Committee fully intends for actual sentencing to be governed by the guidelines issued by the United States Sentencing Commission. The Commission, an independent agency in the judicial branch, has as its principal purpose the establishment of sentencing policies and practices for the federal criminal justice system. The Commission promulgates detailed guidelines prescribing the appropriate range of sentences for offenders convicted of federal crimes. See 28 U.S.C. 994(a).

The Commission already has promulgated hundreds of such detailed sentencing guidelines for particular federal crimes and is in the process of promulgating additional guidelines. See United States Sentencing Commission, Guidelines Manual (November 1, 1989) (hereinafter cited as "Sentencing Manual"). There is no current sentencing guideline for any criminal sanctions under the OSH Act. The lack of an existing guideline can be explained by the fact that there has been little need for one, given the virtual nonexistence of criminal enforcement under the OSH Act. This Act should spur additional prosecutions under the OSH Act. Therefore, the Commission expects the Sentencing Commission to promulgate sentencing guidelines in the future for OSH Act crimes.

In the meantime, the Committee anticipates that sentencing for OSH Act crimes will be similar to sentencing under guidelines for analogous federal criminal provisions. For example, there is a sentencing guideline for the "knowing endangerment" crime under RCRA that was discussed above. See Guideline 2Q1.1, Sentencing Manual at 2.135. The maximum term in the statute for that crime is 15 years, but the sentencing guideline calls for a range of sentences between four and ten years, depending upon the past criminal history of the convicted offender. In addition, if an actual death or serious bodily injury results under RCRA (the crime only requires an imminent danger of death or serious bodily injury), then the guideline allows for an "upward departure," whereby the court

"may increase the sentence above the authorized guideline range." Guideline 5K2.1, Sentencing Manual 5.43. The range of sentences recommended by the Commission for the RCRA crime should provide guidance to courts, prosecutors, and offenders on the range of sentences that would be appropriate for an OSH Act crime, at least until the Commission promulgates new guidelines specifically for crimes under the OSH Act.

C. SERIOUS BODILY INJURY

As discussed in detail in section II of this report, a glaring deficiency in the current OSH Act criminal enforcement scheme is the lack of a criminal sanction for a willful violation that causes serious bodily injury to a worker. The Act remedies that problem by creating such a sanction, patterned after the current penalty for a willful violation that causes death to a worker. The elements of this new criminal offense are identical to the elements for a willful violation that causes death, except the death of a worker is not a condition of the crime. The elements of the new offense, which the prosecutor must prove beyond a reasonable doubt, are: (1) an OSHA regulation, or health and safety standard, rule or order; (2) willful violation of the regulation, standard, rule or order; (3) serious bodily injury to any employee; and (4) a casual link between the violation and the serious bodily injury.

The new offense requires a definition of the term "serious bodily injury," which is a new term in the OSH Act, but which is a familiar term in the federal criminal law. The term appears dozens of times in the United States Code and is defined expressly in six separate federal statutory provisions. The concept of severe injury that is something less than death, is defined for sentencing purposes by the United States Sentencing Commission. In addition, courts have interpreted the term and provided detailed jury instructions on the meaning of "serious bodily injury." For example, the Department of Justice has suggested that this Act include the term "serious bodily injury" as it has already been interpreted by the federal court in *United States* v. *Johnson*, 637 F. 2d 1224, 1246 (9th Cir. 1980). Justice Dept. Letter at 4. In that case, the federal court of appeals listed the factors that a jury could consider in deciding whether a bodily injury constituted "serious bodily injury." The court listed the following factors: substantial risk of death; extreme physical pain; protracted unconsciousness; protracted and obvious disfigurement; protracted impairment or loss of a bodily organ, member or mental faculty; or substantial or significant internal damage (such as important broken bones).

The Committee has reviewed the existing statutory definitions and given due consideration to the sentencing guidelines and the Justice Department's recommendation in crafting a definition of "serious bodily injury" for the OSH Act. The Committee was cognizant of the need to be consistent with current definitions so a to further uniformity of federal criminal law. At the same time, the Committee did not want to include terms that could be overly subjective, so as to limit the predictability, and therefore the deterrent value, of the new offense.

Balancing these factors, the Committee adopted a definition of "serious bodily injury" that is somewhat more restrictive than existing definitions. Under the Act, "serious bodily injury" must involve actual bodily injury and an additional factor associated with the injury. The additional factors are: (1) a substantial risk of death; (2) protracted unconsciousness; (3) protracted and obvious disfigurement; or (4) protracted impairment or loss of a bodily member, organ or mental faculty. Table 1 below illustrates how the definition in the Act compares to existing definitions.

TABLE 1.—COMPARISONS OF SERIOUS BODILY INJURY DEFINITIONS

	42 U.S.C. 6928	33 U.S.C. 1319	21 U.S.C. 802	18 U.S.C. 1365	18 U.S.C. 1864	18 U.S.C. 2245	DOJ LTR Johnson	U.S. Sentencing Commission	S. 2154 (amended)
Terms—Bodily injury that involves:									
Substantial risk of death	X	X	X	X	X	X	X	X	X
Extreme physical pain	X	X		X	X	X	X	X	
Unconsciousness	X	X				X	[1] X	X	[1] X
Protracted disfigurement	X	X	X	X	X	X	X	X	X
Protracted impairment/loss	X	X	X	X	X	X	X	X	X
Medical intervention								X	
Substantial internal damage							X		

[1] The standard in "United States v. Johnson" and in S. 2154, as amended, is protracted unconsciousness.

Notes:
42 U.S.C. 6928 is the "knowing endangerment" provision of the Recource Recovery and Conservation Act (RCRA).
33 U.S.C. 1319 is the "knowing endangerment" provision of the Clean Water Act.
21 U.S.C. 802 is a definition section in the Federal Food, Drug and Cosmetic Act.
18 U.S.C. 1365 is a criminal sanction for tampering with consumer products.
18 U.S.C. 1864 is a criminal sanction for use of a hazardous device on a federal enclave.
18 U.S.C. 2245 is a criminal sanction for sexual abuse within the jurisdiction of the federal government, including a federal prison.
DOJ LTR refers to the Justice Department letter recommending the definition from "United States v. Johnson," 637 F.2d 1224 (9th Cir. 1980).
U.S. SENT. COMM. refers to the criminal sentencing guidelines promulgated by the United States Sentencing Commission.
S. 2154 refers to the OSHA Criminal Penalty Reform Act, as amended by the Senate Labor and Human Resources Committee.

Table 1 shows that the definition of "serious bodily injury" in the Act is consistent with, albeit more restrictive than, existing federal definitions of the term.

To indicate the serious nature of this new offense, the Committee has imposed significant maximum incarceration penalties: 5 years imprisonment for a first conviction, 10 years for a second conviction. These maximum penalties are consistent with the other penalties proposed in the Act and are in line with penalties for similar federal crimes.

The Department of Labor has expressed concern that the creation of a criminal offense for "serious bodily injury" will somehow hinder OSHA's civil enforcement and abatement efforts. Scannell Statement at 9-10. The argument is that the new offense criminalizes routine OSH Act civil violations, which in turn heightens the adversarial relationship between OSHA and employers. Therefore, the Department of Labor is concerned that employers will routinely demand that OSHA secure search warrants pursuant to the Fourth Amendment. Moreover, the Department fears that employers in general will no longer cooperate with OSHA's efforts to obtain prompt abatement of workplace safety or health hazards.

The Committee finds no basis for these fears. In fact, the evidence presented to the Committee indicates just the opposite: this new offense should enhance OSHA's civil enforcement and abate-

ment authority. First, the Act does not criminalize routine OSHA civil violations. Only willful violations that cause serious bodily injury are subject to prosecution. In fiscal year 1989, OSHA found nearly 185,000 violations, but issued only 2,400 citations for willful violations. That fact demonstrates another safeguard against so-called "over-criminalization": OSHA has discretion on whether to refer a case for criminal prosecution and the Justice Department has discretion on whether to prosecute a case referred by OSHA.

There is no evidence that increased criminal enforcement in the environmental area has hurt the EPA's ability to obtain civil enforcement or abatement. Indeed, the Committee believes a greater emphasis on criminal enforcement will enhance OSHA's ability to gain prompt abatement of workplace hazards. This belief is consistent with the experience of state and local officials who have been active in prosecuting workplace crimes under state and local criminal laws. The Committee's position also reflects the views of the Department of Labor's Inspector General who has advocated more aggressive criminal enforcement as one way to reduce the number of workplace injuries or deaths.

D. CLARIFYING CRIMINAL FINES

The Act expressly applies the criminal fine provisions of the Sentencing Reform Act, embodied in 18 U.S.C. 3571, to the criminal fines that may be imposed for crimes under the OSH Act. Under this provisions, the criminal fine for an individual convicted of a felony is not more than $250,000 and for an organization convicted of a felony not more than $500,000; for an individual convicted of a Class A misdemeanor (a statutory maximum prison term greater than six months, but less than one year), not more than $100,000, and for an organization convicted of a Class A misdemeanor, not more tham $200,000. According to the Department of Justice, by operation of law the criminal fine provisions of the Sentencing Reform Act apply to "all offenses described in any federal statute," including the criminal offenses in the OSH Act. Justice Dept. Letter at 2-3. The Committee expressly includes reference to the Sentencing Reform Act in this Act to make clear to potential violators and to OSHA that these new fine provisions are applicable.

The need to clarify this point is illustrated by a recent announcement by the Department of Labor. On April 13, 1990, the Department issued a press release expressing "satisfaction" about a sentence imposed against a Kansas businessman who pleaded guilty to a criminal charge of willful violation of the OSHA construction trenching standard that killed a worker. The sentence which "satisfied" the Department was a four-month suspended jail sentence and a criminal fine of $7,500. The Committee finds no reason to be satisfied with such a sentence. Aside from the lack of a meaningful term of imprisonment, the criminal fine imposed was negligible. Under the current OSH Act criminal sanctions, the maximum criminal fine allowed against an individual offender, as provided for in the Sentencing Reform Act, is $250,000. The actual fine imposed was only 3 percent of the statutory maximum. The Committee is concerned that the Department of Labor has not appreciated fully the changes made in criminal fines by the application of the

Sentencing Reform Act. Otherwise, the Committee cannot understand how such a negligible criminal fine could be deemed satisfactory. To avoid this unfortunate situation in the future, the Committee has included express references to the Sentencing Reform Act in this Act.

The Sentencing Reform Act distinguishes between fines imposed on individual offenders and fines imposed on organizational offenders. The current OSH Act criminal sanctions apply to "employers." This legislation does not change the OSH Act in that regard. Moreover, the Committee does not intend to change the current law that culpable individuals may be subject to criminal sanctions, regardless of whether they would be considered technically to meet the definition of "employer" within the OSH Act. The Committee adopts the position of the Department of Justice on this issue:

> [U]nder current law, culpable supervisors and corporate officers, as well as other persons who have a responsible share in the prohibited conduct, may be punished as principals under 18 U.S.C. [section] 2 for aiding and abetting or for willfully causing an employer's violation, whether or not such persons are themselves "employers" within the meaning of the statute.

Justice Dept. Letter at 5.

The Act also enhances the deterrent impact of criminal fines by holding convicted individuals personally responsible for the payment of any such fine imposed. Incarceration is a particularly effective penalty because it cannot be passed on to another individual or entity. Criminal fines under the Act may be levied against organizational offenders and paid out of the assets of the organization. However, when such fines are levied against individual offenders, those individuals, who have been convicted independently of the organizational offenders, should not be permitted to pass on the costs of the fines to the organization. Thus, a corporate officer who is convicted as an offender will not be able to rely on the employer's corporate treasury to pay any criminal fine. The Committee expects that this prohibition against passing on individual criminal fines will have a significant deterrent effect on potential violators.

E. PREEMPTION

The Act expressly reaffirms that state and local officials retain the authority to prosecute employers for workplace injuries or fatalities pursuant to state or local laws of general application. It is settled law that unless Congress indicates a clear intent to displace state law, federal law does not preempt state law. Thus, silence by Congress means there is no preemption.

But, as discussed in section II of this report, state courts have split over this issue, even though the OSH Act does not indicate that state criminal prosecution of workplace crimes should be precluded. By including an express "no preemption" clause in the Act, the Committee intends to settle this issue once and for all.

There is no issue of preemption in the 23 states that enforce all aspects of workplace health and safety pursuant to an OSHA-approved state plan. However, for the 27 states without a state plan,

OSHA enforces federal occupational health and safety standards. In those 27 states, OSHA controls workplace health and safety, but has nothing to do with prosecuting general criminal law violations. The mere presence of OSHA in a state should not displace the normal operations of state law. Indeed, the Committee believes that authorizing criminal prosecutions by state and local officials will enhance federal efforts to assure safe and healthful working conditions for workers.

The Department of Labor supports the Committee's position. The Department has declared that "States should not be pre-empted from enforcing criminal laws of general applicability, such as those dealing with murder, manslaughter, or assault." Scannell Statement at 12–13. The Committee expects that, in appropriate cases, state criminal prosecutions will complement OSHA civil and criminal enforcement efforts.

VI. Votes in Committee

Votes taken during Committee consideration of the legislation were as follows:

1. The Committee accepted by voice vote an amendment in the nature of a substitute offered by Senators Metzenbaum and Jeffords.

2. The Committee voted to adopt and report S. 2154 as amended, as an amendment in the nature of a complete substitute, by rollcall vote, 11–5.

YEAS	NAYS
Mr. Kennedy	Mr. Hatch
Mr. Pell	Mrs. Kassebaum
Mr. Metzenbaum	Mr. Cochran
Mr. Dodd	Mr. Coats
Mr. Simon	Mr. Thurmond
Mr. Harkin	
Mr. Adams	
Ms. Mikulski	
Mr. Bingaman	
Mr. Jeffords	
Mr. Durenberger	

VII. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, July 11, 1990.

Hon. Edward M. Kennedy,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 2154, the OSHA Criminal Penalty Reform Act, as ordered reported by the Senate Committee on Labor and Human Resources on June 27, 1990. CBO cannot predict the number of future violations or the amount violators would be penalized; based on the historical rate of convictions, however, it is expected that the in-

crease in penalty collections resulting from this legislation would not be significant.

S. 2154 would increase the criminal penalties for violations of the Occupational Safety and Health Act of 1970. The bill would increase the maximum criminal penalty for a willful violation of an Occupational Safety and Health Administration (OSHA) standard that causes the death of an employee from a 6-month prison sentence and/or a $10,000 fine to a 10-year prison sentence and/or a $500,000 fine. The bill would also increase the maximum criminal penalty for a repeated violation of a standard that causes the death of an employee from a 1-year prison sentence and/or a $20,000 fine to a 20-year prison sentence and/or a $500,000 fine. The maximum criminal penalty for giving advance notice of an inspection would be increased from a 6-month prison sentence and/or a $1,000 fine to a 2-year imprisonment and/or a $500,000 fine. The maximum criminal penalty for making a false statement, representation, or certification would be increased from a 6-month prison sentence and/or a $10,000 fine to a 1-year prison sentence and/or a $200,000 fine. In addition, the bill would establish a maximum criminal penalty for a willful violation of a standard that seriously injures an employee. The penalty would be a 5-year imprisonment and/or $500,000 fine for the first violation and a 10-year imprisonment and/or a $500,000 fine for a repeated violation.

In the 19 years of OSHA inspection, OSHA has referred to the Department of Justice 58 cases of employers charged with willfully violating a standard that caused the death of an employee. So far, there have been only 10 convictions from these cases. In addition, OSHA has referred 4 cases charging persons with giving false statements, representations, or certifications but no cases charging persons with giving advance notice of an inspection. Information on the number of convictions from these cases is not yet available.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Karen Graham (226-2820).

Sincerely,

ROBERT F. HALE
(For Robert D. Reischauer).

VIII. REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 2154 is made:

A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OR CLASSIFICATIONS

S. 2154 increases the maximum penalties for existing criminal violations of the Occupational Safety and Health (OSH) Act. The legislation creates a new substantive criminal offense for a willful violation of the OSH Act that causes serious bodily injury to any employee. According to the Bureau of Labor Statistics, the OSH Act health or safety standards apply to nearly 89 million workers. In order to have a criminal prosecution under the OSH Act, however, there must be both a willful violation of a health or safety standard and a resulting death or serious bodily injury. The De-

partment of Labor issued 2,400 citations for willful violations of the OSH Act in fiscal year 1989; 1,269 such citations in fiscal year 1988; 529 willful citations in fiscal year 1987; and 322 such citations in fiscal year 1986. Because a willful violation is a prerequisite for a criminal prosecution, the estimated number of individuals and businesses that will actually be affected by this legislation is extremely small.

B. ECONOMIC IMPACT ON THE INDIVIDUALS, CONSUMERS, AND BUSINESSES AFFECTED

The Committee is unable to determine the precise economic impact the legislation would have on affected individuals, consumers and businesses. S. 2154 authorizes criminal fines in accordance with the existing criminal fine structure in section 3571 of Title 18 of the United States Code. Under that provision, the maximum criminal fine for a felony conviction is $250,000 for an individual and $500,000 for an organization. The legislation, by increasing the maximum incarceration penalties for existing OSHA crimes and by creating a new criminal offense for a willful OSHA violation that causes serious bodily injury, is intended to encourage federal authorities to prosecute OSHA crimes more aggressively. Individuals or businesses could suffer financially if they are convicted of crimes created under S. 2154. On the other hand, more aggressive prosecution of OSHA crimes will enhance civil abatement efforts and will deter potential OSHA violators. Therefore, S. 2154 should lead to greater compliance with occupational safety and health standards which, in turn, should result in significant economic and social benefits to employers and employees. It should be noted that the Congressional Budget Office was unable to estimate how many future prosecutions would be brought and how many such prosecutions would result in judgments against businesses or individuals.

C. IMPACT OF THE ACT ON PERSONAL PRIVACY

S. 2154 should have no impact on personal privacy. The legislation does not change the current statutory or constitutional rights accorded to defendants in a criminal action. Therefore, all personal privacy protections available to criminal defendants remain available under this legislation.

D. ADDITIONAL PAPERWORK, TIME, AND COSTS

Enactment of S. 2154 is not likely to result in significant additional paperwork, time or costs. The legislation could increase the number of prosecutions for OSHA crimes because the maximum penalties for such existing crimes are increased and a new substantive criminal offense is created. The Congressional Budget Office could not estimate the number of additional prosecutions that would be brought as a result of the enactment of S. 2154.

IX. Section-by-Section Analysis

SHORT TITLE

Section 1 establishes the short title of the Act as the "OSHA Criminal Penalty Reform Act."

OSHA CRIMINAL PENALTIES

Section 2(a)(1) increases the current maximum imprisonment penalty for a willful violation of an Occupational Safety and Health (OSH) Act health or safety standard, rule, or regulation that causes death to any employee from six months to 10 years for a first conviction, and from one year to 20 years for a second conviction.

Section 2(a)(2) increases the maximum penalty of imprisonment for a person who gives advance notice of any inspection to be conducted under the OSH Act from six months to 2 years.

Section 2(a)(3) increases the maximum penalty of imprisonment for a person who knowingly makes any false statement, representation, or certification in any application, record, report, plan or other document filed or required to be maintained pursuant to the OSH Act from six months to one year.

Section 2(a)(5) creates a new criminal offense under which any employer that willfully violates any standard, rule, or order promulgated pursuant to section 6, or any regulation prescribed pursuant to the OSH Act, which violation causes serious bodily injury to any employee, will be punished by imprisonment for not more than 5 years for a first conviction or 10 years for a second conviction.

Section 2(a) throughout clarifies that a criminal fine may be imposed in lieu of or in addition to a prison term and that any criminal fine imposed for a violation of the OSH Act should be levied in accordance with the provisions of Section 3571 of Title 18 of the United States Code.

Finally, Section (a)(6) makes clear that an individual officer, director, or agent of the employer will not be able to rely on the employer's corporate assets to pay any criminal fines imposed on such individuals for criminal violations of the OSH Act.

DEFINITION

Under Section 2(b), the term "serious bodily injury" is defined as bodily injury that involves (1) a substantial risk of death; (2) protracted unconsciousness; (3) protracted and obvious physical disfigurement; or (4) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

JURISDICTION FOR PROSECUTION UNDER STATE AND LOCAL CRIMINAL LAWS

Section 2(c) provides that nothing in the OSH Act will preclude State and local law enforcement agencies from conducting criminal prosecutions in accordance with the laws of the state or locality.

X. MINORITY VIEWS

S. 2154 is clearly not consonant with the vision for OSHA that was incorporated by the Act's legislative language as passed two decades ago. One need go no further than the conflicting statements of purpose to uncover this fact. The objective of S. 2154 is to punish violators by means of criminal penalties. Conversely, the objective of the Occupational Safety and Health Act of 1970 is to eliminate all foreseeable and preventable workplace hazards through civil enforcement efforts that will lead to the quick abatement of those hazards. The crux of this policy issue is abatement versus penalty. This legislation will do nothing but upset the balance envisioned for OSHA; the result being a long string of lengthy court proceedings and appeals. This, in turn, will only serve as a counterproductive measure in OSHA's attempt to protect the safety and health of the American workplace.

In testimony before the Senate Subcommittee on Labor, Assistant Secretary of Labor for the Occupational Safety and Health Administration, Gerald F. Scannell, underscored the effectiveness of the department's effort to ensure safety in the workplace. First, the most hazardous workplaces are being inspected. Second, inspections are of the highest quality. And, third, the deterrent impact of OSHA's inspections extends to all employers, inspected or not. The department has increased the incentive for employers to comply with the Occupational Safety and Health Act principally in two ways: by proposing penalties for recalcitrant employers that demonstrate to all employers the seriousness with which the federal government views compliance with its Occupational safety and health requirements, and by seeking agreement at the corporate level to eliminate, on a corporate-wide basis, hazards found on an inspection of a single plant of the parent corporation.

Currently, over 99 percent of OSHA cases become final without contest or are settled prior to hearing. According to Assistant Secretary Scannell, "this allows us to achieve swift abatement of the existing or threatening hazards to workers' safety and health. With the introduction of severe criminal sanctions for a wide range of offenses, I can assure you that our contest rate will be significantly higher. And, when the citation is contested, abatement can be delayed until the Review Commission renders a final order. A final order is the end-product of a lengthy litigation process, which, from pleading, through discovery, to administrative appeal stages may take months to years."

It should be noted that the department has already proposed a separate penalty for each instance of serious violation, thus enabling OSHA to propose high total penalties in cases involving especially serious violations of safety, health, or recordkeeping requirements affecting large numbers of workers. For example, just last April the agency proposed the two largest penalties in the history

of OSHA, one of almost $6.4 million and another for more than $7 million. However, while the department obviously supports the idea that employers be made to comply with the provisions of the OSH Act, the expanded scope of S. 2154, which would criminalize employer conduct that is presently characterized as civil, would seriously jeopardize the policy goal of obtaining prompt abatement of workplace hazards.

Difficulties in enforcement of the Occupational Safety and Health Act, if the provisions of S. 2154 were enacted, were also noted in a letter to Senator Howard Metzenbaum from the Chairman of the Occupational Safety and Health Review Commission, Edmund G. Foulke, Jr. He explained, first of all, that the Commission "frequently stays the civil action until the criminal matters are resolved. The average length of a stay was about 15 months. The OSH Act generally provides that abatement of alleged violations in contested cases is tolled until a final order of the Commission is issued. Thus, the entry of a stay in an enforcement case typically delays any ordered abatement by the length of the stay."

Second, Foulke observed that expanded criminalization of OSHA violations may make it more difficult for the Secretary of Labor to obtain entry to workplaces where such violations are alleged to have occurred. "Since the Supreme Court held in *Marshall* v. *Barlow's Inc.*, 98 S. Ct. 1816 (1978)," he stated, "that nonconsensual OSHA inspections can only be made pursuant to a warrant . . . if a broader range of violations of the OSH Act is criminalized, employers faced with a greater likelihood of criminal prosecution could be expected to demand warrants more frequently. Litigation involving warrants will result in delays to Commission proceedings."

It should be emphasized here that the same conduct may, indeed, subject an employer to both civil and criminal sanctions under the Act.

Finally, as Assistant Secretary Scannell concluded before the subcommittee, "expansion of the criminal provisions will come at a very high price, not only the price of diminished civil enforcement, but even more tragic, the higher price of delayed abatement, which could result in further injuries and fatalities."

We agree with the concerns cited above with regards to S. 2154, namely that its substantial expansion of criminal penalties would interfere with and jeopardize current enforcement efforts. We, therefore, oppose this legislation.

ORRIN G. HATCH.
STROM THURMOND.
DAN COATS.
THAD COCHRAN.

XI. Changes in Existing Law

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 29, UNITED STATES CODE

* * * * * * *

Occupational Safety and Health Act of 1970

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§ 652. Definitions

For the purposes of this chapter—

(1) * * *

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(15) The term "serious bodily injury" means bodily injury that involves—

(A) a substantial risk of death;

(B) protracted unconsciousness;

(C) protracted and obvious physical disfigurement; or

(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

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SEC. 666. CIVIL AND CRIMINAL PENALTIES.

(a) Willful or Repeated Violation.—* * *

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(e) Willful Violation Causing Death to Employee.—Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a [fine of not more than $10,000] *fine in accordance with section 3571 of title 18, United States Code,* or by imprisonment for not more than [six months,] *10 years,* or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a [fine of not more than $20,000] *fine in accordance with section 3571 of title 18, United States Code,* or by imprisonment for not more than [one year,] *20 years,* or by both.

(f) GIVING ADVANCE NOTICE OF INSPECTION.—Any person who gives advance notice of any inspection to be conducted under this chapter, without authority from the Secretary or his designees, shall, upon conviction, be punished by a [fine of not more than $1,000 or by imprisonment for not more than six months,] *fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 2 years,* or by both.

(g) FALSE STATEMENT, REPRESENTATIONS OR CERTIFICATION.—Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a [fine of not more than $10,000, or by imprisonment for not more than six months,] *fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 1 year,* or by both.

(h) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6, or any regulation prescribed pursuant to this Act, and that violation causes serious bodily injury to any employee but does not cause death to any employee, shall, upon conviction, be punished by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 5 years, or by both, except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 10 years, or by both.

[(h)] *(i)* Omitted.

[(i)] *(j)* VIOLATION OF POSTING REQUIREMENTS.—Any employer who violates any of the posting requirements, as prescribed under the provisions of this chapter, shall be assessed a civil penalty of up to $1,000 for each violation.

[(j)] *(k)* AUTHORITY OF COMMISSION TO ASSESS CIVIL PENALTIES.—The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

[(k)] *(l)* DETERMINATION OF SERIOUS VIOLATION.—For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

[(l)] *(m)* PROCEDURE FOR PAYMENT OF CIVIL PENALTIES.—Civil penalties owed under this chapter shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office.

(n) If a penalty or fine is imposed on a director, officer, or agent of an employer under subsection (e), (f), (g), or (h), such penalty or fine

shall not be paid out of the assets of the employer on behalf of that individual.

(o) Nothing in this Act shall preclude State and local law enforcement agencies from conducting criminal prosecutions in accordance with the laws of such State or locality.

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